UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #17cv2120
NANCY AMHAZ,	:	
Plaintiff,	:	
- against -	:	
BOOKING.COM (USA) INC., et al.,	:	New York, New York
		December 22, 2017
Defendants.	:	
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PROCEEDINGS BEFORE
THE HONORABLE HENRY PITMAN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;
Transcript produced by transcription service

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Witness	Direct	Cross	Re-Direct	Re-Cross
None				

E X H I B I T S

Exhibit Number	Description	ID	In	Voir Dire
None				

THE CLERK: Amhaz v. Booking.com, 17cv2120. Counsel, please state your name for the record.

MR. C.K. LEE: C.K. Lee. I'm also with my colleague, Mawash Jaffrey. Good morning, Your Honor.

THE COURT: Good morning.

MS. WENDY MELLK: Wendy Mellk from Jackson Lewis (indiscernible).

THE COURT: All right, good morning all. We're here today to address some discovery issues. In that regard I have plaintiff's letter of November 25, defendants' letter of November 29, and there was another letter that Mr. Lee filed on the ECF system at about 6:30 last night. I've skimmed the letter – Mr. Lee, (indiscernible) 6:30 last night attaching a transcript from December 6? You know, a lot of judges in this court were born at night but they weren't born last night, and what you're doing is pretty apparent.

MR. LEE: Your Honor --

THE COURT: Yeah.

MR. LEE: What I was trying to do was just to provide the Court with some additional information.

THE COURT: 6:30, what, 16 hours before the conference? Fifteen and a half hours before the conference.

MR. LEE: I'm sorry, Your Honor, but I had wanted to submit it earlier, but because I was in a mediation --

THE COURT: Continuously from December 6 until 6:30 last night?

MR. LEE: Well, it was not continuous, Your Honor, but there's nothing like an impending date to stimulate ensuring that --

THE COURT: Yeah, and getting over on your adversary had nothing to do with it, right?

MR. LEE: It really was not intended. I really had wanted to get it in earlier, but, unfortunately, because of my schedule and the different drafts that I had to go through during the course of the day, it did not get submitted until later in the evening. But I do apologize, Your Honor.

THE COURT: Well, I know what you're doing. And it really, it doesn't play.

MR. LEE: The alternative, Your Honor, was that I would've just came in and told the Court orally about --

THE COURT: No, the alternative was you could've filed it on the 7th, the 8th, the 9th, the 10th, the 11th, the 12th. It was a December 6 transcript.

MR. LEE: I --

THE COURT: Even if you got it a week later, that would've been the 13th.

MR. LEE: I understand, Your Honor, but there's - there is --

THE COURT: There's nothing like the tactical advantage of serving something like 6:30 the before --

MR. LEE: Your Honor --

THE COURT: -- a 3 o'clock conference.

MR. LEE: Your Honor, it's an advantage that I don't think I need. And the reality really was I wanted to get it in earlier, and, unfortunately, I wasn't able to focus my attention in preparing for this hearing until a day or two beforehand. And so that's why I wanted to submit a follow-up. I apologize, Your Honor.

THE COURT: I've had attorneys doing this nonsense for 20 years, you know, I don't know why they do it, I really don't. All right. Where do things stand? I understand from defendants' letter things have moved on somewhat since the November 22 letter? Where do things stand, Mr. Lee?

MR. LEE: Sure. Well, I think in terms of the depositions, the depositions have been scheduled. So that issue is resolved. And I think in terms of discovery, the main issue that is outstanding is regarding class

discovery and e-discovery. That's really the main issues that are outstanding which we hope to resolve this morning, Your Honor.

THE COURT: All right. Well --

MR. LEE: And I'm happy --

THE COURT: I looked at the discovery responses. Let me turn to defendants' counsel. Miss Mellk, I looked at your discovery responses, and do they comply with the December 2015 amendments to the Federal Rules of Civil Procedure?

MS. MELLK: Your Honor, we felt that they did because --

THE COURT: Are they specific? Do they state whether or not documents are being produced?

MS. MELLK: I believe they did state when we did produce documents.

THE COURT: Are they specific?

MS. MELLK: Are they specific as identifying the --

THE COURT: No, are your responses, your objections stated with specificity as is now required by Rules 33 and Rules 34?

MS. MELLK: We felt that they were specific. Certainly, if Your Honor wants --

THE COURT: They're clearly not.

MS. MELLK: If Your Honor would like us to, we can amend it, but we felt --

THE COURT: But I can also find a waiver.

MS. MELLK: We did not intend to waive our objections, Your Honor. We felt --

THE COURT: Yeah, but I'm not sure you intended to comply with the December 15 amendments either.

MS. MELLK: We felt that they were incredibly overbroad (inaudible), that was the issue.

THE COURT: And do you explain how they're overbroad in the objections?

MS. MELLK: We do, Your Honor, I believe.

THE COURT: Well, you may want to take a look at Judge Peck's decision in Fisher v. Forrest from earlier this year. It was on the front page of the Law Journal. Well, the other thing you may want to do is take a look at Hickman v. Taylor again. It's only 70 years old. Justice Murphy wrote in Hickman v. Taylor, "We agree, of course, that the deposition discovery rules ought to be accorded a broad and liberal treatment. No longer can a time honored cry of fishing expedition serve to preclude a party from inquiring into the facts underlying his opponent's case."

You make that objection at least twice in your

letter. It's a disfavored objection. It's been disfavored for 70 years. Discovery has its limits, but fishing expedition, you know, Justice Murphy I think disposed of it 70 years ago. Let's get to the heart of the matter though and talk about whether or not precertification discovery here is appropriate. Why don't I hear from Mr. Lee on that issue and then I'll hear from defense counsel.

MR. LEE: Thank you, Your Honor. Just in terms of being able to conduct discovery on the class, I think it's important that we be allowed to obtain payroll information to ascertain that other account managers were paid --

THE COURT: What discovery has been permitted hasn't been limited to the identity of potential class members?

MR. LEE: In terms of the - I don't recall that there's been a ruling limiting it to identity of class members, but --

THE COURT: Well, what did Judge Maas do in Feit, in Faye, excuse me?

MR. LEE: Sure, Your Honor, but I think there's been various ranges --

THE COURT: What did Judge Maas do in Faye? That's the case you cite in your letter.

MR. LEE: He allowed for identities of individuals, but --

THE COURT: He permitted the discovery of names, positions, job titles, dates of employment, last four digits of social security numbers, addresses, and telephone numbers.

MR. LEE: Sure.

THE COURT: Where precertification discovery has been permitted, hasn't it been limited?

MR. LEE: I think in that context there was a limit, but because here it's an exemption case, and so I think it would be helpful to ascertain just by the payroll records that the other account managers are paid in the same manner at the various offices --

THE COURT: Is that an appropriate part of certification?

MR. LEE: I believe it's --

THE COURT: Is there a case that suggests that kind of discovery is appropriate prior to certification?

MR. LEE: Yes, Your Honor, it's the - it's in the letter that we submitted to the Court yesterday.

THE COURT: The one that you submitted 15 ½ hours ago, 6:30 last night.

MR. LEE: That's right, Your Honor.

THE COURT: I haven't read it.

MR. LEE: I understand. And we submitted it to the Court just because I wanted to put something in writing, and the alternative was just coming in here today to tell the Court orally, but the case was with Judge Ramos, and it's Alvarez v. Schnippers, and he allowed payroll records to be provided in anticipation of a collective motion. And, similarly, on Serenity Spa, Benevides v. Serenity Spa was another decision that supported the same assertion that discovery is appropriate to either prove or disprove the plaintiff's claims for collective or class certification.

THE COURT: What did the plaintiff here do?

MR. LEE: She's an account manager. And so what they did was booking.com is a website that sells accommodation bookings. So it's basically like a hotel.com or Expedia, and a consumer can go on the website and reserve hotel rooms at a discount from different types of hotel chains. In order to do their job, what they do is they're basically salespeople. They correspond with hotel clients in order to obtain inventory of rooms at competitive rates so that they can list them on the booking.com website, and booking.com generates revenues by taking a percentage commission off of that.

THE COURT: But what – I'm looking at a case that Judge Ramos decided involving the same issue in 2015, a case called Mata v. Footbridge LLC where he limited discovery to the names, job titles, last known mailing addresses, and email addresses, telephone numbers, dates of employment of named coworkers of the plaintiff. Did he permit broader discovery in the December 6 transcript that you provided last night?

MR. LEE: He did.

THE COURT: What --

MR. LEE: For the Schnippers Restaurants he allowed discovery for multiple locations.

THE COURT: Of what?

MR. LEE: Of the workers.

THE COURT: Contact information or something beyond contact information?

MR. LEE: I believe it was beyond contact information.

THE COURT: What information beyond contact information did he permit discovery of?

MR. LEE: Just payroll records, Your Honor. And I know Judge Peck recently had allowed in a case against Park-It Garages, he allowed discovery for all parking attendants across 30 locations in New York City

even though the claimant only worked at 4 of the 30 locations specifically to allow the plaintiff an opportunity to prove or disprove his allegations for class claims. And I can supplement that to the Court also.

THE COURT: For whom are you seeking discovery? What individuals are you seeking discovery of? Is it just other account managers?

MR. LEE: Yes, it's other account managers. Other account managers, key account managers which are --

THE COURT: Sorry?

MR. LEE: Key, K-E-Y, key account managers.

THE COURT: Key account manager.

MR. LEE: It's a similar title except they handle larger accounts. And junior account managers which are --

THE COURT: Is the last one junior --

MR. LEE: Junior account managers, yeah.

THE COURT: All right, anything else?

MR. LEE: And so we were looking for, what I think would be fair would be at least a sampling across the different locations for these type of positions across a six-year period.

THE COURT: Well, how do you get to - with respect to the FLSA claim, how do you get to a six-year

period? I mean when you're talking about folks outside of New York, how do you get to a six-year period?

MR. LEE: Oh, sure. Well, we can limit the state law period to the relevant period of length where that branch office is, but --

THE COURT: Did plaintiff work in New York, Nevada, or someplace else?

MR. LEE: She worked in Nevada and also New York. And so --

THE COURT: She's physically in both locations?

MR. LEE: Yes, she was physically in both locations. And so I think the decisions that Judge Peck made, that Judge Ramos made was for not just doing discovery for the collective motion but for the Rule 23 motion. And the two motions really are independent --

THE COURT: Yeah, but I mean the Rule 23 might get you six years or folks in New York, but I don't know what the rationale would be for six years for people outside of New York.

MR. LEE: I guess it would be - to keep things easier, Your Honor, I can concede to a three-year period.

THE COURT: All right. Let me hear from defense counsel.

MS. MELLK: Thank you, Your Honor. So as I see

it, there's two issues, that, number one, he wants a list of all, as he defines it, covered employees, and then, number two, he wants document discovery with respect to that group of covered employees. And I'll note that in his discovery request, Mr. Lee defines covered employees as account managers and key account managers, not junior account managers, and Miss Amhaz was never a junior account manager.

THE COURT: Is there such a position as junior account manager?

MS. MELLK: I don't think there is. There is a lower position than account manager, which is a non-exempt position, and she never held that position.

THE COURT: What is the lower position that you just referenced?

MS. MELLK: It may be called junior account manager or it may be called coordinator.

THE COURT: All right. But people in that lower position are not - the defendant has not taken the position that those folks are exempt?

MS. MELLK: Correct.

THE COURT: All right, go ahead.

MS. MELLK: Correct. So with respect to the lists, Mr. Lee has not given us any reason why he needs a

list. It's unnecessary for his collective action. The plaintiff, who we deposed on Tuesday, has been in contact with many other at least former, maybe current, account managers and key account managers, and she testified that she knows how to contact these people --

THE COURT: How many was she in contact with?

MS. MELLK: At least eight or nine.

THE COURT: And how many are there employed --

MS. MELLK: Over this year three-year period --

THE COURT: Yeah.

MS. MELLK: -- there's a couple of hundred.

THE COURT: All right.

MS. MELLK: And she, in her affidavit that she submitted, again, at 6:45 the night before her deposition, she refers to how she's spoken to many, many people, she's spoken to people in every single office where there are account managers and key account managers. And so clearly she knows how to contact people to be able to provide Mr. Lee with information she may need to move for certification.

With respect to --

THE COURT: Well, I mean would you concede that if the information that she has from eight or nine people would be sufficient for things like typicality and the

other criteria that are applicable in Rule 23? I mean it seems like it's a fairly small sample out of 300 or 400 employees. And I mean, look, let's, you know, discovery concerning class certification issues prior to the class certification motion is routine in this court.

MS. MELLK: Well, I will note that Magistrate Peck, and since Mr. Lee referred to Magistrate Peck, in the Wang v. The Hearst Corporation, clearly said that the plaintiff was trying to get in the back door (inaudible) information they would only otherwise get if the collective action is certified, and he specifically was referring to the list

THE COURT: Yeah, and Judge Pauley wrote in Glad v. Fox Searchlight Pictures, "The weight of authority in this district councils in favor of allowing disclosure of class contact information in FLSA cases prior to the conditional certification of a collective action," citing a case decided by Judge Sand.

MS. MELLK: We have another concern is that we do believe that, we are concerned about the reason, about the way in which the list will be used, and our concerns are based on what Mr. Lee has been doing, and what he has been doing is he's been using LinkedIn to send messages to current and former, or I think current booking.com

employees and has said - this is just one of the printouts - "Tara sent you a message about" --

THE COURT: I'm sorry, just again, the first thing you said, Paris said?

MS. MELLK: Tara.

THE COURT: Tara.

MS. MELLK: "Sent you a message about (inaudible) on Indeed," which is a job search site. And then it goes on to say, "Booking.com, priceline.com lawsuit opening at Lee Litigation Group." And so this is designed to look like a job opening targeting booking.com --

THE COURT: Can I see that for a second please? Show it to Mr. Lee and then let me see it please, okay?

(pause in proceeding)

MS. MELLK: And my client only learned about this because somebody forwarded it to her.

THE COURT: Are they all the same?

MS. MELLK: No, it's a four-page document.

THE COURT: All right, okay. Just hold on for one second. Let me take a look at it. I'm going to hear from you further, but let me look at that first, okay, please? Thank you. Just give me one second.

(pause in proceeding)

THE COURT: All right, I'm not familiar with social media, so maybe you want to tell me, who was this disseminated to or how is this out there, let me put it that way?

MS. MELLK: So they go on to job search sites that are linked in and found people who worked for booking.com and have sent that to them. Look at a job.

THE COURT: You can - there are websites you can go onto to find people who work for booking.com?

MS. MELLK: LinkedIn.

THE COURT: LinkedIn gives a list of people who work for booking.com?

MS. MELLK: Yes, you can - there were groups. So it will show you everybody at booking.com. There are groups that you can belong to. It's easy to search.

THE COURT: So there's already a publicly available list of people who work for booking.com?

MS. MELLK: You can go onto - in fact, the plaintiff testified that's how she was able to get a lot of (inaudible). (inaudible) by going on LinkedIn and finding people that she knew. I don't know if she did the booking.com search, but certainly finding people that she knew so that she could get the contact, their current contact information.

So we --

THE COURT: Well, let me - I mean why is that a bad thing? I understand why it's a bad thing from booking.com's point of view, but there have been some decisions lately post-Cheeks, there's also Judge Kaplan's decision in Knights of Cabiria I think it is --

MR. LEE: I'm sorry, which --

(interposing)

THE COURT: -- which talk about the importance of the public knowing about the FLSA of employees, about workers knowing about the FLSA and the rights that it provides.

MS. MELLK: Your Honor, we feel that this kind of communication is duplicitous. I mean it's saying, it's getting people's attention say there's a job opening, not there is an FLSA lawsuit. I mean that's how they got their attention.

So we are concerned about the use - we don't really know why he needs a list. He's got people out - there's no dispute as to how these people were paid. They were all classified as exempt. That is not a dispute. So certainly the payroll records are not going to be able to provide anything that would be of use in a collective action certification motion since it is not a merits

motion. We are not disputing that the account managers and the key account managers were classified as exempt.

THE COURT: Well, are you willing to concede that the plaintiff's claims here are typical of the claims of other account managers and key account managers and that they present common questions of fact?

MS. MELLK: We are not willing to concede that key account managers in every office of booking.com performed their jobs in the same manner. And he already has another opt-in in New York.

THE COURT: Yeah, but that's two out of several hundred.

MS. MELLK: I mean, well, the standard you're citing to is only applicable for the New York group.

THE COURT: Well, how many are in New York?

MS. MELLK: About 40.

THE COURT: So what is that, 4 percent roughly or 5 percent of the employees in New York?

MS. MELLK: Well, when we calculated the approximate 300 number, we went back three years. So there aren't a total at this point of 300 account managers and key account managers. That is the total of the (inaudible) collective.

THE COURT: No, but without this information,

how does the plaintiff draft a motion for 216(b) condition cert or Rule 23 certification?

MS. MELLK: Your Honor, Miss Amhaz, at least with respect to New York, testified that she's spoken to many people, and that --

THE COURT: I think you told me eight or nine out of several hundred.

MS. MELLK: Well, many of those were in New York and there's only 40 in New York. And her testimony was that when she reached out to them, she spoke to them, she told them about her wage claims, she told them her belief that they were misclassified, and she asked them to call Mr. Lee. I don't know if they called Mr. Lee. We know one other opt-in who apparently opted in in August, but we just learned of it in November.

And she clearly, she was able to identify with three other key account managers that she worked in New York, and just to be clear, she was in Las Vegas, and then in December of 2014 she transferred to New York, and she left New York in May of 2015. So she was in New York for a six-month period of time. And she was able to identify everybody that she worked with in New York.

THE COURT: Right, but that's still a small percentage of the people in New York. I mean it sounds

like it's less than --

(interposing)

MS. MELLK: -- probably about at least a quarter.

THE COURT: I mean are there 40 people over the six-year limitations period?

MS. MELLK: Correct. Yes. Over the six-year period. There were three other - she was a key account manager while she was in New York. There were three other key account managers, one of whom I believe is an opt-in in this case.

THE COURT: Well, why is she - tell me why you believe she's not entitled to, why plaintiff is not entitled to contact information nationwide for at least a three-year period for the FLSA limitations period?

MS. MELLK: In her affidavit, I mean she talks about - she lists - let's see, -- she lists 11 people --

THE COURT: Which affidavit are you referring to?

MS. MELLK: This is an affidavit that the plaintiff provided to us again, I think this was given - we took her deposition on Tuesday and we were given this affidavit at 6:45 p.m. on Monday --

THE COURT: I haven't seen this affidavit.

MR. LEE: Yeah, it's not part of the submission for this discovery dispute, Your Honor.

MS. MELLK: It's not part of --

THE COURT: Can I see it for a second please?

MS. MELLK: I'm just going to see if I can find a clean copy.

THE COURT: Okay.

(pause in proceeding)

THE COURT: Just give me a second to take a look at it. Thank you.

(pause in proceeding)

THE COURT: And why was this affidavit submitted?

(interposing)

THE COURT: Well, either one. Why was the affidavit submitted? Go ahead.

MR. LEE: Thank you, Your Honor. The affidavit, I'm not sure what's considered late or early, but there is a contemplated collective motion that we are intending to file at some point. There was a deposition scheduled I believe last Tuesday, this past Tuesday. And Miss Amhaz lives outside of New York, so she had to fly into New York in order to be deposed this past Tuesday.

To avoid having her to let's say come twice

because if we were to submit an affidavit from Miss Amhaz with a collective motion subsequent to her deposition on Tuesday, I wanted to avoid a situation where defendants say, hold it, we want to depose her because she submitted an affidavit to support her motion which was not provided before our deposition --

THE COURT: Okay.

MR. LEE: So in full disclosure, and she was only able to fly in the day before to be prepped for her deposition, and that's when we wrote this, and because it was a full day prep, that took all day --

THE COURT: All right.

MR. LEE: -- we weren't able to complete it until prior, just to the deposition.

THE COURT: Let me go back to Miss Mellk. You were in mid-argument when I asked to see the affidavit, so go ahead.

MS. MELLK: I do want to note something before I forget it. With respect to the Rule 23 class, one of the other issues that we have, and Mr. Lee and I have not discussed this fully, but Miss Amhaz is not an adequate class representative. She's got a sexual harassment claim pending against my client that's part of this lawsuit, two claims --

THE COURT: Yeah, I've looked at the complaint.

MS. MELLK: So, therefore, I just wanted to bring that before the Court. I know it's not really the issue right now, but certainly her interests are different than the class members within New York. While I don't have the case law in front of me, I do believe that there is case law that supports our position.

So in any event, we don't think there's any need to provide a class list at this point, that you've read Miss Amhaz's affidavit. She's got plenty of ways to contact people who she believes has knowledge about - and it's really --

THE COURT: Well, in opposition - let me ask you this. I mean in opposition to 216(b) motion and Rule 23 motion, I mean I presume the defendant wants to reserve its rights to rely on information concerning account managers other than the 11 that she has identified here.

MS. MELLK: We do, Your Honor.

THE COURT: Yeah, I mean the number that she knows about sounds like it's a fairly small subset of the universe of account managers and key account managers. Am I misunderstanding something?

MS. MELLK: Well, at her deposition her testimony was that every time she went to a training or to

a meeting, and that she went to at least eight or nine trainings or meetings in Amsterdam and other trainings, all of the account managers and all of the key account managers were there and they would all talk and she knows who they are.

THE COURT: No, but - you know, I go to training programs the Federal Judicial Center holds where there are magistrate judges from across the nation there, but I could give you maybe two or three names but that's about it. I suspect that her experience at these training seminars is going to be the same. I mean is there a contact list disseminated at these programs?

MS. MELLK: I'm not sure there's a contact list, but she also said that they keep in touch after the trainings.

THE COURT: With hundreds of people?

MS. MELLK: There weren't hundreds of people while she was there. The 300 number comes in over a three-year period of time. So there weren't hundreds while she was there.

And, Your Honor, I do go back - I have very significant concerns that if we were to provide contact information to Mr. Lee, I am concerned about how that contact information would be used. And I also want to

note I did read the Schnippers decision because I was, it was obviously served on me and I wanted to come prepared. But my understanding of what was done by the judge, Judge Ramos in that case is that the issue in that case was whether or not the five restaurants acted as an enterprise, and so I don't believe the Judge ordered a list. I believe he ordered the production of payroll records, and he ordered that the personal information on those payroll records be redacted. So that was my reading of it, and admittedly I read it only once. So I don't think that that, you know, certainly supports.

But I do have very significant concerns about how the information would be utilized and --

THE COURT: Oh, he's going to use the information to reach out to them presumably and solicit them as additional plaintiffs.

MS. MELLK: Yeah, well, to me it's sort of improper solicitation. It's one thing to call people and ask for information; it's another to improperly solicit them to be a member of a collective action. I mean that's why we have the notice provision under 216(b) so that the court can regulate the communications between the parties and potential class members.

MR. LEE: Your Honor, can I respond --

THE COURT: Anything else you want to tell me? Let me just finish with defense counsel here.

MS. MELLK: So I was just talking about the class list. Certainly, in terms of the documents that Mr. Lee is seeking, and he's seeking all of the wage related documents, and I'm sure Your Honor looked at the document production request and the interrogatory requests relating to the amount of wage information. Again, it's not necessary at this stage of the game. We are not disputing that all of these individuals were exempt. So it's just not necessary.

And in terms of having to actually produce that information, it is incredibly burdensome, will be incredibly expensive for my client, and as Your Honor knows, this is an opt-in action. If people opt in, we will provide that information. But certainly to make us provide it at this stage of the game is not proportional to the needs of the case.

THE COURT: All right.

MR. LEE: Thank you, Your Honor. As the Court noted, Miss Amhaz has some information that can support the motion. I don't think it's up to the defendants to dictate how much evidence plaintiff should be able to provide to the Court. We've - we believe that having

additional people that we can speak with, obtain additional information to support the motions would be helpful, and we believe defendants providing a contact information and the payroll information, which is I believe all automated, I think all they have to do is push a button, would not be burdensome. Thank you, Your Honor.

THE COURT: All right.

MS. MELLK: Your Honor, may I just --

THE COURT: Go ahead.

MS. MELLK: -- say one thing?

THE COURT: Go ahead.

MS. MELLK: I do want to note that Mr. Lee took our 30(b)(6) witness deposition. Between now and January 9, he's going to take three managers' depositions, and then he's going to take the former head of HR's deposition in early February. So certainly he's able to gather quite a bit of information from all those people as well.

MR. LEE: I think having oral testimony is helpful, Your Honor, but I think --

THE COURT: Let me come back to Miss Mellk for a minute. I mean the oral testimony is going to give him the contact information.

MS. MELLK: Correct, Your Honor.

THE COURT: Yeah. All right. Go ahead, what

did you want to say?

MR. LEE: Yeah, I believe frequently the documentary evidence is more helpful because people's memories aren't clear, and obviously she's not going to be able to spew off 300 people's contact information off the top of her head. And I don't think that the list is only 300, you know, in the context of these class claims for a large corporate – it's not unduly burdensome. I mean 300 is a number for a class list that is very common. Thank you, Your Honor.

THE COURT: All right.

(pause in proceeding)

THE COURT: Well, I've looked at – well, despite the fact that I have a lot of reservations about the adequacy of defendant's responses to the discovery requests under the December 2015 amendments to the Federal Rules of Civil Procedure, I'm not going to find a waiver at this time because, well, first of all, plaintiff doesn't argue it, I guess maybe that's the most compelling reason. I am going to distribute to counsel though copies of Judge Peck's decision in Fisher v. Forrest, and I strongly recommend that you take a look at it and take a look at the December 2015 amendments because boilerplate objections to discovery requests really are no longer

valid and haven't been valid for the last two years. But the bar, many members of the bar have not learned that fact yet.

With respect to the scope of the discovery that the plaintiff is seeking here, I think the plaintiff's scope of discovery is beyond what's appropriate prior to a condition certification motion or a class certification or the granting of conditional certification or class certification. He's seeking detailed, plaintiff is seeking detailed information about other account managers and key account managers which I think, prior to conditional cert or class certification, they're not in the case.

However, as Judge Pauley pointed out in Glatt v. Fox Searchlight Pictures, 2012 W.L. 2108220, 2012 W.L. 2108220 (decided June 11, 2012), "The weight of authority in this district counsels in favor of allowing disclosure of class contact information in FLSA cases prior to the conditional certification of a collective action," and for that proposition he cites Whitehorn v. Wolfgang's Steakhouse Inc., decided by Judge Sand, 2010 W.L. 2362981 (S.D.N.Y., June 14, 2010), and also Judge Maas's decision in Faye v. West LB, 2008 W.L. 7863592 (S.D.N.Y. 2008). The same result was also reached by Judge Ramos in a case

called Mata v. Foodbridge, 2015 W.L. 3457293, 2015 W.L. 3457293.

So what I am going to direct is that defendant provide the names, dates of employment, addresses, telephone numbers, and email addresses to the extent they have that information for account managers and key account managers. I'm going to direct that it be provided for account managers and key account managers in New York for the period for six years prior to the commencement of the action, for key account managers and account managers employed for six years prior to the commencement of the action for those individuals who worked in New York, and for those individuals outside New York for three years prior to the commencement of this action. Information beyond that I think is premature at this time.

All right, how much time do you need to do that?

MS. MELLK: Our client, I mean it's Christmas, it's holiday time, so we'll need a couple of weeks.

THE COURT: I mean is this information that you can, that they can print out on the computer fairly easily or you don't know?

MS. MELLK: I don't know. I don't know. Your Honor, while you're looking for dates --

THE COURT: Well, it's not going to take me

long. Can you do it by January 12? That's the end of the second week in January. So that's three weeks from today.

MS. MELLK: We will do our best to comply by that date, and if we're unable to, we'll --

THE COURT: Okay.

(interposing)

MS. MELLK: -- inform Mr. Lee and the Court.

THE COURT: All right. What else?

MS. MELLK: I just, you know, again, I just wanted to reiterate our concerns about - we understand you're ordering us to provide the contact information, but we certainly are very concerned about what the nature of the communications between Mr. Lee and these prospective class members is going to be based on this. I mean I, you know, we understand that the plaintiff, I disagree that she's entitled to it, but certainly the Court's position is you can use it to investigate her claims. But I'm very concerned that there's going to be actual solicitation. And so I think there has to be some sort of framework in how Mr. Lee's office is allowed to talk to these people and communicate with them because it's, frankly, prejudicial to my client.

THE COURT: Well, is the prejudice that you're concerned about is the possibility of additional claims

being asserted or something else?

MS. MELLK: Well, look, as you know, Jackson Lewis, my office handles lots of these cases. We understand a notice goes out, and notice is regulated by the court, and there are specific things that can be said, there's specific things that can't be said. And so we understand people are going to opt in, they'll read the notice and they'll make their decision.

My concern, and I'm going to be very blunt, and I apologize, is that the call goes out, hey, you can join, you know, there might be money in this for you, come, you know, sue them. You know, that's different than calling people to say we want to get some information about what your job duties were. That's a different kind of conversation, and that's really - what this is about, in my understanding --

THE COURT: But as a practical matter - look, I haven't ordered the production of email addresses, and I think your concern --

MS. MELLK: You did order the production.

THE COURT: Well, all right, then I'm going to revise my ruling and remove email.

MS. MELLK: Thank you, Your Honor.

THE COURT: But having done that, the number,

as a practical matter, I think the number of individuals that plaintiff can contact is going to be modest.

MS. MELLK: I feel much more comfortable not having to provide the email --

THE COURT: Email, yeah, okay, no emails. Okay. But I mean ordinarily you wouldn't be entitled – if this was purely a case involving identification of potential witnesses as opposed to potential witnesses who may also be parties, you wouldn't be entitled to judicial oversight of what your adversary says to potential witnesses.

MS. MELLK: But, Your Honor, my understanding of why we are being asked to product a contact list is so that the plaintiff is able to support her certification motion in the face of our objection. It's not to prove her claim, and it's not to look for more parties. It's to be able to have facts to show that she is similarly situated to other people in the other offices, etc. It's not --

(interposing)

THE COURT: Merits discovery, there's no bifurcation here of merits discovery or class discovery. So I mean she can talk to these people to get evidence to support her claims.

MS. MELLK: And we understand that, that's what we understand why we're being ordered to give the list. But we're concerned that it's going to be like come sue, come, you know, why don't you join us instead of we're trying to get information about a lawsuit that we're bringing and we want to understand what your job duties were. That's a different conversation. And whatever they make take from it, they may take, oh, is there a lawsuit, I want to join. That I understand. But having a conversation of we're bringing a lawsuit, you know, asking questions and saying it in a manner where we're trying to encourage people to join is different to mean is really not the purpose of providing the contact list.

And my concerns are valid based on the document that's sitting on top of your desk. And so that's - I just want to really articulate that because it is a concern to us.

MR. LEE: Could I --

THE COURT: Mr. Lee.

MR. LEE: Could I address this, Your Honor? Thank you. You know, I worked with Miss Mellk for many years now, and I'm a little bit disconcerted by the allegations that's being alleged. Firstly, even in the document that Miss Mellk in her best effort to disparage

me with we're not soliciting. The language is very clear we're investigating the claims. And I've done many, many of these claims, Your Honor, and I don't think that for this one case I would be wanting to risk a reprimand because any person that I'm contacting potentially can be reaching, could still be an employee of booking.com and could be working with defendants --

(interposing)

THE COURT: -- "pending lawsuit against booking.com and priceline.com, here is the link," and then there's an email, a web address. "Here's the link for more information. If you have any information or would like to join the lawsuit, please reach out."

MR. LEE: And so --

THE COURT: It comes right after a paragraph that says, "This notice constitutes attorney advertisement." Go ahead.

MR. LEE: Well, the language that we send out is intended to be an investigation, and even though we have the attorney advertising language, it's because there have been times when people say we don't include that, and they believe that it should be included. So I just include that language just to be safer because people say, you know, we are, could be perceived to be an

advertisement.

But I guess the issue about the email, Your Honor, I would just ask that the Court reconsider because frequently people use email a lot. It's a correspondence that --

THE COURT: Well, they use the phone a lot too.

MR. LEE: Understand. That's fine, thank you.

THE COURT: I mean frequently, in this day and age a lot of people just delete emails from uniden - senders that are unknown to them.

MR. LEE: Understand. I concede.

THE COURT: Let me come back to Miss Mellk. Miss Mellk, I understand what you're saying, but what remedy are you seeking? What do you want me to do?

MS. MELLK: My remedy is that we don't (inaudible). I mean --

THE COURT: That horse has left the barn.

MS. MELLK: I mean to the extent that he's sending a mailing, I think we should have a copy of the mailing. I want to see what he's sending to these people so that if we have issues, we can bring it to the Court's attention.

THE COURT: Well, the problem I have with that though is that ordinarily what an attorney says to a

potential witness, the communication with a potential witness is work product.

MS. MELLK: He's reaching out to contact these people. He's got a --

(interposing)

THE COURT: Right, and they're sort of in a hybrid role. They're potential parties, they're potential witnesses. Right?

(interposing)

THE COURT: And ordinarily --

MS. MELLK: -- (inaudible), look, I'm concerned. That's what I'm noting to the Court. I am concerned about the nature of the communication, and, again, it's based - yes, I've known Mr. Lee for years. This case is turning out to be somewhat more contentious than most of our other cases. But, you know, I have to protect my client. And, frankly, I'm concerned that it's not, you know --

THE COURT: Is what you're suggesting been done in any other case that you're aware of?

MS. MELLK: I think courts in reacting to concerns like mine, like Magistrate Peck did in Wang v. Forrest and then I have a couple - what all of the judges in the Eastern District do is they don't allow (inaudible)

to be circulated. I understand Your Honor's ordered it, but I certainly, you know, I will note that we will be paying attention, and I, you know, I think - again, my concern is there's going to be an improper solicitation.

MR. LEE: Your Honor, I've been adequately forewarned by Miss Mellk, and I obviously will conduct myself in a manner to limit her concerns.

THE COURT: Well, I'm not - I mean, Miss Mellk, if you have authority or if you have precedent for some kind of judicial oversight at this stage, I would welcome it and I would be happy to consider it. But I'm not, you know, as I said, ordinarily, you know, Hickman v. Taylor was about an attorney's communication with a witness, and that's sort of the heartland of work product.

MS. MELLK: And --

THE COURT: And that's the conflicting interest here. I understand what you're saying.

MS. MELLK: And this is why I go back to why many courts, and, again, I understand --

THE COURT: Not the weight of authority in this district according to Judge Pauley --

(interposing)

THE COURT: -- and Judge Sand.

MS. MELLK: Your fellow magistrates, I mean,

you know, Wang v. Hearst --

THE COURT: I have the highest respect for my fellow magistrate judges, but it's a hierarchical system.

MS. MELLK: Your Honor, I - the mechanism of the FLSA is --

THE COURT: That horse has left the barn.

MS. MELLK: Yeah, I mean, look, I can go look, and certainly if I find something, I'll bring it to the Court's and Mr. Lee's attention. But I am very concerned about this, and, you know, I think it prejudices my client.

THE COURT: All right. Well, again, if you have authority for some kind of judicial oversight in this district, I would consider it and I welcome it. But with respect to the decision on what gets disclosed, there's compelling authority from district judges in this court, at least three, one of which states that the weight of authority permits this kind of disclosure. That was Judge Sand's language in the case that was quoted by Judge Pauley. And Judge Sand was certainly I think one of the giants of the bench.

All right, I'm going to adhere to my decision. Again, if you have some authority, I'd be happy to consider it.

Mr. Cansalarich (phonetic), these two go back to defendant's side. Let me ask you also to give each side of a copy of Judge Peck's decision in Fisher v. Forrest and suggest that they review it because reliance on boilerplate objections these days can get you into trouble that you don't want to get into.

All right, anything else – I now have the case for general pretrial supervision, so if you have more discovery disputes, they should be before me or scheduling issues they should be before me, but the reference from Judge Daniels was not just for this discovery dispute but also for GPT.

Mr. Lee, anything else we should be considering today from your point of view?

MR. LEE: Yes, Your Honor. In terms of e-discovery, I had been in correspondence with defendants who tried to obtain e-discovery. We had provided the search terms for them. And my understanding is that they did not agree to my search terms or the custodians, and that's a current dispute that's outstanding that --

THE COURT: This was one of your document requests I think?

MR. LEE: Yes, it's number 31, Your Honor.

(pause in proceeding)

THE COURT: Have you sat down and tried to negotiate search terms?

MR. LEE: I have, Your Honor, and we met and conferred. I can – we can endeavor to do it again because I know the Court is busy. And is Miss Mellk is amenable to that, we can try to redouble our efforts to try to resolve it without judicial interference.

MS. MELLK: Your Honor, I'm more than happy to sit down again Mr. Lee and see if we can work through it, but our understanding, and this was based on a communication we had after we had a meet and confer, was that we agreed that we would search Michelle Vrod, V-R-O-D, who is Miss Amhaz's, who was her supervisor, and Amy Acceturra who was the former head of HR, we would search her emails and produce any emails that reference Miss Amhaz. So if there's additional things that Mr. Lee would like, I am more than happy to sit down and have a second conversation before we have to get the Court involved. We certainly understand e-discovery and obligations. So I think that the parties can try and work that out, but we did agree to produce them and the search is being done.

MR. LEE: Your Honor, I think the issue is the defendants agree that that's what they would produce. I didn't think that was enough. They would only allow

production for emails between Miss Acceturra and Miss Vrod with Nancy's name. I don't think that's sufficient. I have a broad list of email search terms which I think should be used. They've wholesale refused to provide any searches in terms of the search terms I've included which would include --

THE COURT: I'm looking at your search terms. I think these are going to generate a huge volume of documents.

MR. LEE: Well, I believe that under the - first of all, you know, there hasn't been an agreement on who the custodians are and, once we agree on who the custodians are, what the search terms should be. Now, my position is that they should produce --

THE COURT: I mean her HR - her claim under the human rights law relates to what she was told to do?

MR. LEE: Yes, it's --

THE COURT: And how she was told to interact with clients?

MR. LEE: That's right. Her --

THE COURT: It's not a pay discrimination claim, is it?

MR. LEE: I'm sorry, Your Honor?

THE COURT: It's not a pay discrimination

claim.

MR. LEE: It's not a pay discrimination. She's alleging sexual harassment in that her immediate supervisors would --

THE COURT: Told her --

MR. LEE: -- to look sexy.

(interposing)

THE COURT: -- certain way to clients, okay.

MR. LEE: That's right.

THE COURT: Well --

MS. MELLK: Your Honor, I'm, as I said, as Mr. Lee suggested, I'm more than happy to sit down with him one more time to take a shot at custodians and search terms before we need to involve the Court. Our understanding, and we put it in an email that was not rejected by Mr. Lee, was this is what we were going to do. Again, I'm more than happy to try and be cooperative and (inaudible).

THE COURT: Usually, the emails tend to be more relevant or take on a greater role in cases where there's an allegation of a failure to promote or pay discrimination as opposed to the kind of claims that are asserted here. I mean I'm looking over your search terms, Mr. Lee, and I think they're going to generate --

MR. LEE: The --

THE COURT: -- an awful lot, a lot of irrelevant documents --

(interposing)

MR. LEE: Your Honor --

THE COURT: Let me suggest this. Does the defendant have an IT department or an IT specialist?

MS. MELLK: The way that it's, that the e-discovery is done is that we retain a third party, and the emails are brought, they're downloaded onto the third-party system. I mean it's a timely and expensive process.

THE COURT: Yeah.

MS. MELLK: And so we certainly would prefer to do it in a way that is not wasteful and doesn't, you know, obviously the defendant pays for this. And so, again, I'm willing to sit down with Mr. Lee and see if we can come to some agreements about narrowing the terms, I mean there's not that many custodians. There's Amy Acceturra who was the head of HR. There's the plaintiff, and she testified - I will tell you, Your Honor, she testified she never complained about exemption issues or classification issues or anything like that during her employment, and with regard to her sexual harassment claim, she says the first time she complained was in, was approximately a couple of

weeks before she left.

So, again, we're more than – if HR had any communication with anybody about her complaint, we're more than happy to produce it. We're more than happy to, you know, we thought our agreement was to look at Michelle Vrod and Amy Acceturra. I'm willing to have a discussion.

THE COURT: Let me ask you this, I mean because I know your firm represents, I think represents defendants exclusively in the employment context. Has your firm ever utilized predictive coding in e-discovery matter?

MS. MELLK: I believe in the Publicis case that was before Magistrate Peck, I believe they used predictive coding. But --

THE COURT: Did it work well or poorly or something else?

MS. MELLK: I don't know. I don't know. I have to speak to my colleagues who handled that case. But there was a lot of – I believe there was – [To colleague: You may know better than I. Were you involved in the Publicis case?] But I certainly can find out and let the Court know about whether it was effective.

Certainly, right now all we have is Nancy and --

THE COURT: I mean, look, I'm inclined to limit – I'm sorry. I said I'm inclined to limit the e-discovery

at this stage to the limits suggested by Miss Mellk but without prejudice to a renewed application for further e-discovery from plaintiff, I mean if that's something both sides can live with. I mean a lot of times, many times a defendant rather do e-discovery in one fell swoop because each iteration has its own cost.

MS. MELLK: That's fine with me, and, again, I'm more than happy to a conversation, to avoid, you know, Mr. Lee coming back to the court, we limit it to these issues right now, and I'm – Mr. Lee and I can speak and see if we can come to some sort of agreement about expanding e-discovery.

MR. LEE: Your Honor, my general understanding of what's the most efficient way to proceed, and e-discovery just takes a long time sometimes, is that under the Sedona Conference protocols the parties try to agree on a set of search terms, even if it is a little bit more encompassing. So I'm happy to try to revise some of these search terms which may come up with false positives, but I do think that the e-discovery should include more than just Nancy herself individually, should include custodians other than Miss Acceturra or Miss Vrod. And it should be sufficient to cover her sexual harassment claims individually and to cover her potential class claims

across the various locations. How we get there I'm happy to work that out with Miss Mellk.

THE COURT: Well, I mean preliminarily it seems to me that the universe of custodians you'd want to be searching with respect to her harassment claims, I would think would probably be narrower than the universe you'd be searching, than the custodians you'd be searching with respect to her other claims.

MR. LEE: I don't disagree, Your Honor.

THE COURT: All right. Well, at this point, why don't we - I'm going to limit the e-discovery to emails and ESI from Vrod and Acceturra that refer to plaintiff without prejudice to a renewed application after counsel have had an opportunity to confer further on this issue. And I guess the next time we discuss this issue I guess what I'd like to see is, if you can't come to an agreement, a list of the custodians - well, presumably there's going to be some custodians on which you agree, I hope, and with respect to the custodians on which you disagree, your respective positions on them and the same with respect to the search terms on which you disagree.

MS. MELLK: And if we get to that point, I'll be able to give you more information on predictive coding as well.

THE COURT: Yeah, have you used predictive coding, Mr. Lee?

MR. LEE: We have not. We have not.

THE COURT: All right.

MR. LEE: So --

THE COURT: Go ahead.

MR. LEE: Judge, the one last topic, Your Honor, is, as it's towards the back of our letter, it's regarding the 30(b)(6) witness topic list. Defendants had objected to a number of our topics that we wanted to ask the 30(b)(6) witness, many of which relate to her sex harassment claim or the common enterprise analysis.

THE COURT: I'm sorry, I'm looking at defendant's letter of November 15 I guess which lists the topics that are in dispute.

MR. LEE: Yes.

THE COURT: Which ones do you want to talk about?

MR. LEE: So I'm just going down the list. Subject matter number 11, complaints regarding sex discrimination or harassment for other employees. I believe that's important because it shows how they handle sex harassment claims and whether they are wholesale ignored or whether they have some protocol that they

actually follow. The allegation from Miss Amhaz is that she complained to multiple people and she was not able to get a proper response, and that's why she terminated her employment at the end because she felt such an oppressive work environment that she was not able to continue working there.

MS. MELLK: Your Honor, if I may --

THE COURT: Go ahead.

MS. MELLK: Number one, that wasn't what she testified to. She testified she didn't complain. She didn't complain until in or about May (inaudible). So when she left, she gave her notice of leaving on May 11, and left May 27. So that is just plain untrue.

Number two, at the 30(b)(6) deposition, we produced the current head of HR. Mr. Lee did not ask him what is the company's procedure for investigating sexual harassment claims? What do you do? We agreed with Mr. Lee at the 30(b)(6) witness deposition that the 30(b)(6) witness was prepared to answer questions about sexual harassment claims in the New York office and in the Las Vegas office. Her claim is a very limited claim. She claims that her supervisor --

THE COURT: She was allowed to answer questions about claims, sexual harassment claims --

MS. MELLK: Yeah, New York and Las Vegas. But he never asked what was the process for investigation, what do you do? We produced policies. So, you know, I think that is, it is, that issue is disingenuous. Yeah, he asked a question, are you aware of anybody in New York or Las Vegan who's had a claim. This is Mr. Lee asking my 30(b)(6) witness.

THE COURT: And what is the answer?

MS. MELLK: No, other than Miss Amhaz.

THE COURT: Okay.

MR. LEE: But he --

MS. MELLK: So - and he will be taking the deposition of the former head of HR on February 2, and we agree, I mean it's not a 30(b)(6) deposition because she's no longer with us. He certainly can ask her those kinds of questions.

With respect to the other issues regarding the so-called enterprise, we have already admit, stipulated to him that we do not dispute that booking.com generates over $500,000 in revenue. So all of this, contracts, vendors, bank, I mean it's irrelevant to her claim.

THE COURT: Yeah.

MR. LEE: Your Honor, it's not irrelevant because even though they make more than the statutory

requirement, it goes to whether they're a common enterprise. There are factors that are considered, factual factors in regards to whether they pay the vendors out of one account through their different offices, whether --

THE COURT: Why is that important at this stage?

MR. LEE: Well, it goes to the common enterprise analysis to see if the various offices and locations and the employees are operative --

MS. MELLK: We're not disputing that the various offices of booking.com, I mean we just said we'd produce a list of the 300 covered employees, not something that we're disputing. We are not claiming that the Honolulu office of booking.com is a separate employer than the New York office.

MR. LEE: Well, I think that's a separate issue. The issue is whether they're a single integrated enterprise --

THE COURT: Why is that important?

MR. LEE: It's important for the collective and class analysis in regards to whether the same policies are controlled by a single center.

THE COURT: I think that's what Miss Mellk just

stipulated to.

MR. LEE: Okay, well, if she stipulates that they're a single integrated enterprise --

(interposing)

MS. MELLK: -- single integrated - anybody who worked - we're giving you a class list of --

MR. LEE: She hasn't really said it on the record.

THE COURT: Well, why don't you let her finish.

MR. LEE: Okay.

THE COURT: She was in mid-sentence.

MS. MELLK: I'm giving you a class list of everybody who was an account manager or key account manager of booking.com. We have never taken a position that employees of booking.com U.S.A. are all part of a single integrated enterprise. That's never been our position.

MR. LEE: You mean you're saying --

MS. MELLK: booking.com U.S.A. is a single inte - you know, if you're a key account manager or account manager for booking.com U.S.A., you are employed by booking.com U.S.A. I'm, frankly, a little surprised that we're having this conversation --

THE COURT: I'm not sure where you're doing,

Mr. Lee.

MR. LEE: Well, as long as she's stipulated that it's a single integrated enterprise, that's fine.

THE COURT: Okay.

MR. LEE: Thank you.

THE COURT: I mean it sounds like with respect to other complaints or allegations of sex discrimination, I mean Miss Mellk is telling me that the 30(b)(6) was prepared to testify to that.

MR. LEE: Well, he --

THE COURT: With respect to the relevant offices.

MR. LEE: Well, he was new, but he didn't know anything.

THE COURT: That's not what she just read.

MR. LEE: He said --

THE COURT: That's not the testimony she just read --

(interposing)

MS. MELLK: If you had asked him different questions --

MR. LEE: I can't read his mind. He was trying to impede the deposition the whole time.

(interposing)

THE COURT: Wait, wait, wait, wait, wait. Say that - I didn't hear you, Mr. Lee.

MR. LEE: I'm just saying I couldn't read his mind because frequently he would, you know, not answer questions directly. But that's fine.

THE COURT: That's why you ask follow-ups.

MR. LEE: I'm sorry?

THE COURT: That's why you ask follow-up questions at a deposition.

MR. LEE: I understand, Your Honor. But, you know, the president of booking.com was, he was hired for sexual harassment. There obviously is some stuff there.

THE COURT: Did the plaintiff work with the president of booking.com?

MS. MELLK: No, Your Honor. The plaintiff worked in Las Vegas and --

(interposing)

MR. LEE: And --

THE COURT: No, that's what I understand. I'm not sure that everybody - I mean the fact that - I don't know where you're going with this, Mr. Lee.

MR. LEE: Your Honor, that's fine, you know, I don't think the other people are 30(b)(6) witnesses anyway. So that's fine.

THE COURT: All right.

MS. MELLK: Yeah, and he ask (inaudible). I actually have one issue --

THE COURT: Go ahead.

MS. MELLK: Which we've raised to Mr. Lee and we haven't raised to the Court yet because we did want to take the plaintiff's deposition. So with regard to her sexual harassment claim, she is claiming emotional distress damages, and she testified as to how she's a different person now than she was before, and she testified that she posts on Facebook and on Instagram and possibly other social media sites.

And so we have requested that historical printouts of the Facebook and the Instagram and Snapchat sites, and similar to our objections, we received --

THE COURT: I'm sorry, Facebook, Instagram and what, Snap --

MS. MELLK: Snapchat. If you have teenagers, you would know these things. Snapchat (inaudible). And she posted them during the sexual harassment, after the sexual harassment, and so we feel it's relevant to our ability to --

THE COURT: But you've served a request for these?

MS. MELLK: Correct. And there was an objection, and then we sent a deficiency letter. And, again, we didn't raise it to the Court because we wanted to see what she would say at her deposition, and she did confirm the postings.

THE COURT: Mr. Lee.

MR. LEE: We've never had a chance to meet and confer about this, Your Honor, so at the very least, I'd like the opportunity to do so. And this --

THE COURT: Well, it sounds - my understanding is --

(interposing)

THE COURT: Hold on a second, hold on a second. My understanding is that these applications are used, are not used for privileged communications. They're to disseminate information on a wide basis?

MS. MELLK: They're a social media. You connect with friends and other (inaudible) --

THE COURT: I mean do you control who you connect with?

MS. MELLK: Yes.

MR. LEE: Can I explain what these are? So, for example, on Facebook, Your Honor, if you were to open a Facebook account and let's say your extended family

members live around the world, you can post a picture of yourself let's say hiking in the mountings or having dinner at a nice restaurant, and then it's an easy way to keep in touch with your friends and family around the world, and there are communities, depending on the type of usage or the type of social person you are, you can include people who are immediate family members, you can include, allow strangers to go on. And so --

THE COURT: You wouldn't use these applications to communicate with your attorney or your priest or your doctor, would you?

MR. LEE: Not really, they're really to show --

MS. MELLK: What's going on in your life.

MR. LEE: -- how your life is --

(interposing)

THE COURT: -- wider audience than one person.

MR. LEE: Yeah, it goes to - well, it's more than one person, but it would be restricted to the circle of social sphere that you wanted, and you can be posting some fairly personal information or you could be posting not very personal information --

(interposing)

THE COURT: Let me cut to the chase here. I would encourage you to have a meet and confer on this --

MR. LEE: Thank you, Your Honor.

THE COURT: -- but it sounds to me like it's fair game. I'm not going to rule on it today, but --

MR. LEE: My only concern is that it's --

THE COURT: It sounds like it's fair game.

MR. LEE: My only concern, Your Honor, is that this is not a personal injury case where she's alleging she was shot in the foot and that she has like huge health problems, and then you see her jetskiing in the mountains. There have been cases like that where that's appropriate. But for here I believe that to request all of her social media is disproportionate and not --

THE COURT: Why is it disproportionate? How much is she seeking in damages and what's the cost of producing it?

MR. LEE: I think --

THE COURT: Disproportionate is like the new black. People are throwing it around without any thought whatsoever.

MR. LEE: Well, I just think it's an invasion of privacy --

THE COURT: If she's putting it up on Facebook, how is it private?

MS. MELLK: And she's putting --

(interposing)

MR. LEE: Well, because it's only --

(interposing)

MR. LEE: -- it's only for people that you like.

THE COURT: Well, it's a non-privileged communication though.

MR. LEE: So, for example --

THE COURT: So how is it private?

MS. MELLK: Your Honor, she --

THE COURT: Look, I'm not ruling on it today. I encourage you to meet and confer, but --

MR. LEE: Thank you, Your Honor.

THE COURT: -- you know, it seems to me, at most, this is analogous to somebody seeking somebody's diary, and there's no privilege that attaches to a diary. Diaries are discoverable, entries in a diary are discoverable if they're relevant.

MS. MELLK: And in terms of producing --

MR. LEE: Thank you, Your Honor.

MS. MELLK: -- it, I believe it's merely push a button. You push a button and print it out.

MR. LEE: Yeah, I think the issue is whether it's relevant and (indiscernible) --

THE COURT: Well, you know, if she's claiming emotional distress and she's going waterskiing in the Florida Keys or going down ziplines in the Amazon, that's probably relevant.

MS. MELLK: It is relevant because she testified that she stays in her home. She doesn't come out of her house for three to four days. She's much less social than she used to be --

THE COURT: Well, I'm not - you know, look, maybe there's something in her posts that is truly irrelevant to the issues in this case, and maybe there's some expectation of privacy. Maybe she's sending it to trusted friends or something. I don't know what people put up on these applications. So I'm not going to address it today. I may need to wait to see if there are specifics. But it sounds to me if it's fair game.

MR. LEE: Thank you, Your Honor. We'll do some research.

THE COURT: You know, it's - if she's alleging emotional distress - you know, if she put up some post, you know, either complaining or congratulating a political figure, you know, maybe that might be irrelevant.

MR. LEE: Yeah, I'll give an example --

THE COURT: So and so is a great candidate and

I'm happy he or she was elected or so and so is a horrible candidate and I'm happy he or she lost. I'm hard-pressed to see how that bears on emotional upset or emotional distress, but if she's posting vacation pics where she's having a good time, I think that is relevant. So --

MS. MELLK: Or her engagement (inaudible) if she gets engaged.

THE COURT: Well, I'm going to encourage the parties to meet and confer on that issue, but unless it's something that doesn't bear on emotional distress, I think it's probably - or doesn't arguably bear on emotional distress, I think it's probably discoverable. Okay?

MR. LEE: Thank you, Your Honor.

THE COURT: All right? Anything else --

MR. LEE: Appreciate the guidance, thank you.

THE COURT: Again, I encourage you to read Fisher v. Forrest because it, the December 15 amendments really do work a major change in Article 5 of the Federal Rules. All right. I hope you all have a good holiday and a good new year.

MR. LEE: Thank you, happy holiday, Your Honor.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Amhaz v. Booking.com, et al., Docket #17cv2120, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 26, 2017